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Supreme Court, U.S.
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No. 92-1522

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

AMERICAN NATIONAL BANK & TRUST COMPANY - - - - - Petitioner

versus

H. C. HANSON,
VIRGINIA HANSON,
H. C. HANSON CONSTRUCTION COMPANY and
CONSTRUCTION ENGINEERS, INC. - Respondents

Petition For A Writ Of Certiorari
To The Supreme Court Of Kentucky

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Petitioner timely and properly developed a substantial federal constitutional issue in the state courts for this Court's review.

2. Whether the Petition should be granted where the Supreme Court of Kentucky unanimously affirmed the trial court's judgment against the Petitioner and expressly found that the jury instructions applying Kentucky's punitive damage statute and the post-trial review were sufficient in light of *Pacific Mut. Life Ins. Co.* v. *Haslip,* 111 S.Ct. 1032 (1991).

PARTIES TO THE PROCEEDING

The Respondents are H. C. Hanson ("Mr. Hanson"), Virginia Hanson ("Mrs. Hanson"), H. C. Hanson Construction Company, Inc. ("Hanson Construction") and Construction Engineers, Inc. (collectively "the Hansons").

The Petitioner, American National Bank & Trust Company ("ANB" or "Bank"), is a wholly-owned subsidiary of First Kentucky National Corporation ("FKNC"), which is a wholly-owned subsidiary of National City Corporation.

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STATEMENT OF THE CASE

Respondents do not accept Petitioner's statement of the case. ANB's statement of the facts is replete with misstatements and omissions (Pet., 2-6).

This is a tort action for damages for fraud and deceit. After a twenty-four day trial, the jury concluded that ANB forced Hanson Construction to default on $3,670,000 in

contracts and through intentional fraud destroyed the company. ANB secretly planned and carried out its fraud against the Hansons during 1985, 1986 and 1987. The jury's verdict for $1,065,000 in compensatory damages and $5,775,000 in punitive damages was based on clear and convincing evidence and the jury's express finding of fraud. This is the first punitive damage case decided under Kentucky's new punitive damage statute, Ky. Rev. Stat. Ann. ("KRS") §§ 411.184 and 411.186 (Michie 1992) (effective July 15, 1988) (App. 1a-2a). The punitive damage instruction covered all the definitions, factors and guidelines for the jury outlined in the statute (App. 3a-8a). Special verdict interrogatories insured exactness with respect to the issues submitted and the jury's findings on those issues. Ky. CR 49.01.

ANB's Petition seeks review of a unanimous Supreme Court of Kentucky Opinion entered December 17, 1992, that affirmed the judgment against ANB based on the jury's verdict. *Hanson* v. *American Nat. Bank & Trust Co.*, 844 S.W.2d 408 (Ky. 1992) (Pet., 1a-16a). The Kentucky Supreme Court's Opinion gave careful consideration to *Pacific Mut. Life Ins. Co.* v. *Haslip*, 111 S.Ct. 1032 (1991). The Kentucky Supreme Court did not attempt to state all of the facts supporting the judgment but just the facts "necessary for an understanding of the issues presented" (844 S.W.2d at 411; Pet., 2a-4a). The Court's statement of the facts is incorporated by reference as an overview of ANB's fraud and deceit.

ANB's fraud was not limited to the inducement of a loan restructure as ANB implies (Pet., 5, 7). Instead, ANB, through a preconceived plan to defraud them, restructured the Hansons' loans on July 26, 1985, and then cut off their credit on February 5, 1987. The Hansons were good customers of ANB and never defaulted on any payment to ANB during their 15-year banking relationship. However, after FKNC took over ANB on February 11, 1985, ANB

included the Hansons' accounts within a whole tier of customer accounts that it reclassified as "problem" accounts and selected for termination. None of the customers, including the Hansons, were advised of the status of their accounts. If the Hansons and customers like them had been advised, they could have changed banks. However, ANB's secrecy and deceit denied them that opportunity.

ANB's plan for the Hansons was to restructure the Hansons' personal and business loans and take additional collateral, including a mortgage on Mrs. Hanson's house and farm, to improve its own position before it terminated their credit. The plan was concealed from the Hansons. However, it was documented in an internal bank memorandum dated July 8, 1985, that surfaced during discovery. The memorandum was identified and introduced at trial as the "Gurbach Memo" (App. 9a-16a). The author of the memo, Tom Gurbach, was a member of what FKNC and ANB called a "SWAT Team." FKNC sent the SWAT Team to ANB with a new president, Robert Aldridge, from First National Bank of Louisville on February 11, 1985. The Kentucky Supreme Court referred to the SWAT Team as a "task force" (844 S.W.2d, at 411; Pet., 2a-4a).

Aldridge had "orders" from FKNC to "clean up" the bank during 1985-1987. The SWAT Team's mission was to help Aldridge target accounts considered substandard and prepare plans to terminate them with a minimum loss to the Bank. It was in the context of this mission that the Gurbach Memo stated, in part:

> If the bank foreclosed today it would lose, on an optimistic basis, $140M if the building and land which he operates out of brings its full appraised value at auction and the equipment brings the value the Last Bid book indicates. The loss on a conservative basis would be closer to $250M. . . . However, if ANB waited three to five months to foreclose it could come out with no loss due to the *taking of additional collateral* set out earlier. . . . (emphasis added).

Consistent with the SWAT Team's mission, the Gurbach Memo concluded that:

> Overall this rewrite should reduce the bank's potential loss and *force Mr. Hanson to sell off his personal assets* which undoubtedly will bring more than if the bank auctioned them off. (emphasis added).

At a meeting on July 9, 1985, the SWAT Team approved the Gurbach Memo subject to a modification on timing (App. 17a-18a). The SWAT Team knew ANB had to finance Hanson Construction for at least a year before the cutoff. If a cutoff of credit forced the Hansons into bankruptcy within a year of the restructure, ANB knew that it could lose its newly acquired collateral because another creditor might claim a preference or fraudulent conveyance under sections 547 or 548 of the Bankruptcy Code. The SWAT minutes stated:

> We are going to wrap everything together, *take all collateral we can get* and we should be fairly well secured. We are going to give him a line of credit for this year. We will also be secured by contracts from counties he is working in. We have a $100,000 life insurance policy. Take a good look at this in September to see what his cash flow will be ($635,706.21). (emphasis added).

Gurbach and ANB's attorney, Larry Hinton, had the restructure documents ready for ANB on July 11, 1985. ANB's scheme for the termination of the Hansons' accounts was in place before Gurbach and McElroy met with Mr. Hanson on July 12, 1985 (Pet., 4).

ANB misrepresents that Mr. Hanson did not contact David Chesnut until after Mr. Hanson's letter of July 15, 1985 (Pet., 4). The misstatement is important because it implies that the restructure was Mr. Hanson's plan. It was not. Instead of Gurbach and McElroy, ANB used Chesnut to lure the Hansons into the restructure (Pet., 4).

Chesnut was the Hansons' loan officer and had been since 1974. Chesnut was the number two man at ANB after the change in ownership. ANB continued to use Chesnut as the Hansons' loan officer because the new management knew the Hansons trusted Chesnut. ANB exploited that trust to induce the Hansons into the restructure.

Chesnut and Mr. Hanson had meetings on July 13 and 15, 1985. Chesnut recommended that Mr. Hanson write the letter to supplement the financing that Gurbach, McElroy and Chesnut had all promised and agreed ANB would provide. For that reason Hanson's letter ". . . mentioned no other financing for future operations" (Pet., 4). Aldridge and Gurbach knew Chesnut was negotiating with Mr. Hanson. McElroy did not. Gurbach admitted he altered the July 15 letter without Mr. Hanson's knowledge to make it conform to the Gurbach Memo. On July 16, 1985, Chesnut told Mr. Hanson that ANB had approved his request for the supplemental financing. Mr. Hanson discussed it with his wife. On July 16 or 17, 1985, the Hansons agreed to the restructure based specifically on Chesnut's representations. ANB's omission of these facts is misleading.

Gurbach scheduled the closing for the restructure for July 26, 1985. The Hansons and the Corporate secretary for Hanson Construction attended the closing without counsel. They signed the restructure documents without reading them based on assurances of Chesnut and Hinton that the documents had been prepared just as agreed. Gurbach was present and knew the Hansons were deceived about the contents of the documents. The promised financing was omitted. ANB never intended to include it. The documents used were the same documents Gurbach and Hinton prepared and furnished to ANB on July 11, 1985. ANB implies that the documents were brief (Pet., 5). They were not. The legal documents consisted of 91 pages.

ANB skips the period from the restructure to January, 1987 for good reason (Pet., 5). During the interim ANB temporarily performed the promised financing it had omitted from the documents and later denied having made. At trial, banking experts agreed that without ANB's promises, the Hansons gave ANB additional collateral but got nothing in return. Absent ANB's promises, the restructure could not work. The Hansons had no reason to know ANB omitted its promises or to question ANB's performance of its promises before February 5, 1987. ANB's temporary performance concealed its fraud. In June, 1986, ANB established a line of credit for a new project with terms just as agreed. On January 20, 1987, Mr. Hanson left a meeting at ANB with the understanding that financing for the 1987 construction season was just a phone call away. He called ANB on February 2, 1987.

Before ANB cut off the Hansons' credit it made no complaint about the Hansons' performance. The Hansons were never in default. The Hansons had always paid as agreed. ANB ignored the turnaround in Hanson Construction's financial condition when it terminated the Hansons' credit on February 5, 1987. Hanson Construction's losses had dropped from $206,873.76 to $182,249.34 in July; from $182,249.34 to $174,555.67 in August; from $174,555.67 to $96,749.10 in September; and, at year end October 31, 1986, it was showing a profit. In addition, ANB was no longer exposed on a $100,000 letter of credit for bonding. Hanson Construction had paid ANB $117,000 more than required. The principal balance of the July 26, 1985 note was paid down to $484,685. ANB had collateral valued at $850,050.

ANB's cutoff was without default, without notice, and without demand. The cutoff at the beginning of the 1987 construction season was especially harsh. A three-year slump in the construction industry had ended. Hanson

Construction's future was bright. Its work had increased from $250,000 at the time of restructure to $3,670,000. ANB made no inquiry about bonding; in fact Hanson Construction had bonding (Pet., 6). ANB made no inspection of Hanson Construction's equipment; in fact it was well maintained (Pet., 6). ANB made no inquiry about expected profits; in fact Hanson Construction had cash flow to service the debt (Pet., 5-6). The credit analysis that ANB claimed was the basis for its cutoff did not consider the $3 million in new construction contracts Mr. Hanson acquired between May, 1986 and February, 1987 (Pet., 5-6). McElroy knew about the contracts but failed to tell the analyst as he should have. Also, McElroy altered bank records to show the maturity date for the June 6, 1986 line of credit note as February 1, 1987, instead of June 6, 1987.

ANB used the cutoff just as Gurbach had planned. ANB pressured the Hansons to sell off their property. ANB made no demand on February 5, 1987, because it wanted to hold out the possibility of further financing and prolong the pressure on the Hansons to make them cooperate with its plan. ANB had the Hansons' assets tied up. ANB had total control over the Hansons' credit. ANB knew that no alternative financing was available to the Hansons. ANB advanced $21,000 for three weeks' payroll, while it pretended to negotiate with the Hansons, to conceal its cutoff from prime contractors until it could grab another $41,500 in progress payments due Hanson Construction. ANB's cutoff was not for the reasons it claimed (Pet., 3, 5-6). It was in furtherance of ANB's secret plan.

ANB's demand on March 11, 1987, was an afterthought (Pet., 6). A call from the Hansons' counsel alarmed ANB's counsel. ANB's counsel triggered the demand. Payment on the restructure note was not due until March 26, 1987. However, by March 23, 1987, ANB's fraud had forced Hanson Construction out of business. The company was destroyed.

The Hansons introduced evidence of ANB's losses during 1985-1987 to show that ANB's termination of their accounts was because of its own financial condition, not the Hansons' financial condition as ANB claimed. ANB's response revealed the motive for ANB's fraud, the duration of its fraud, the concealment of its fraud, the magnitude of the harm, ANB's awareness of the harm, and ANB's failure to take any action to mitigate the harm.

ANB's president, Aldridge, admitted that the termination of the Hansons' credit was just part of a larger scheme he put in effect at ANB during 1985-1987 to clean up the bank. Up to a 1,000 accounts were affected. Aldridge revealed he had "orders" from FKNC to charge off the accounts "with a minimum loss to the bank."

Aldridge testified that during 1985-1987 he used every penny of ANB's profits, and more, to cover the resulting losses. He had assisted FKNC with the purchase of ANB and expected the losses. They were planned for in the purchase. Aldridge admitted that he knew the termination of customer accounts would be "mean and nasty" and had to be kept secret from the Bowling Green community. Otherwise, no one would bank at ANB. Because of his knowledge, when FKNC asked Aldridge to be president of ANB, he refused—twice. Aldridge refused to be president of ANB until FKNC agreed to pay him a higher salary and send ANB money to cover losses if they exceeded ANB's profits. At the end of 1986, FKNC had to send $2 million to ANB to cover extra losses so Aldridge could finish his so-called "clean up" in early 1987.

Aldridge boasted about his "clean up." He terminated about $11 million in customer accounts and recovered $8.26 million of the losses from tax credits and sales of collateral which secured the terminated customer accounts. ANB's net loss, $2.74 million, was less than he and FKNC had expected. Aldridge admitted that others could have run ANB differently.

ANB showed no remorse for its misconduct. Instead, ANB attempted to intimidate the Hansons' counsel (App. 19a-25a). ANB's trial strategy was to disclaim the Gurbach Memo, deny that ANB had pre-planned the termination of the Hansons' accounts, and assert vindictive counter charges of fraud and bad faith against the Hansons. Its tactics failed.

REASONS WHY THE PETITION SHOULD BE DENIED

1. ANB Did Not Timely and Properly Develop a Constitutional Issue in the State Courts For This Court's Review.

ANB has failed to comply with Sup. Ct. R. 14.1(h). It also ignored a similar rule in Kentucky. Civil Rule 76.12(4)(c)(iv) ("[Appellant's brief] . . . shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review, and if so, in what manner."). ANB did not demonstrate to the appellate courts of Kentucky that it had preserved a constitutional issue there, nor has ANB made such a showing here. For good reason. ANB did not preserve for review by the Kentucky appellate courts, or by this Court, the federal constitutional issues it now attempts to raise. ANB's amended answer contained only the following pallid assertion:

> 2. This answering Defendant raises as an affirmative defense the bar under the Constitution of the United States and the Constitution of Kentucky, of the imposition of punitive damages herein.

This generic defense makes no mention of the Fourteenth Amendment and is insufficient to raise and preserve a constitutional issue for this Court. *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 77 (1988) ("A party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon.").

Nor did ANB preserve a challenge to the constitutionality of Kentucky's punitive damage statute, KRS §§ 411.184, 411.186, in the Kentucky courts. The Kentucky Court of Appeals called attention to ANB's failure:

> The only objection we find to the punitive damage instructions is that the evidence was "not of sufficient quantity or quality to justify that."

The Supreme Court of Kentucky noted: "The trial court submitted instructions applying the factors set out in KRS §411.186. The constitutionality of this statute is not in issue in this case." (844 S.W.2d at 415; Pet., 12a). Again, there is a good reason why ANB did not challenge the statute. ANB urged the trial court to incorporate the statute in the Court's instructions to the jury. It has admitted in its Petition:

> The Bank did not object at trial and does not raise here the question of whether the punitive damage instruction actually given to the jury was correct. That instruction was a correct and accurate representation of Kentucky's punitive damage statute, Ky. Rev. Stat. Ann. § 411.186 (Michie 1992).

(Pet., 11).

Nevertheless, ANB complains to this Court that the trial court erred when it refused to instruct the jury about claims the trial court had dismissed on ANB's motion for a directed verdict. This "directed verdict issue" is one involving Kentucky evidence, Kentucky procedure and the trial court's discretion. Ky. CR 50.01 ("The order of the court granting a motion for a directed verdict is effective without any assent of the jury."). Moreover, ANB waived the issue in the trial court. The Kentucky Court of Appeals described the waiver: "No further request was made about advising the jury of the directed verdict, and the [trial] court apparently never did." (Pet., 27a). The Supreme Court of Kentucky added that the special verdict

interrogatories the trial court used to instruct the jury "best prevents the jury from considering immaterial issues and submits to the jury only the appropriate contested issues" (844 S.W.2d at 412; Pet., 5a-6a). If there was any risk, and there was none, that the jury might draw improper inferences from the evidence or the court's instructions, under Kentucky practice it was the responsibility of ANB's counsel to address the risk in closing argument. *Collins* v. *Galbraith*, 494 S.W.2d 527, 531 (Ky. 1973). *Ford Motor Company* v. *Fulkerson*, 812 S.W.2d 119, 122 (Ky. 1991) ("This case illustrates why we caution against instructions getting into evidentiary matters, subquestions which better practice suggests should be omitted from the instructions and left to the lawyers to flesh out in closing arguments.").

The constitutional "spin" that ANB tries to put on the "directed verdict issue" was not passed upon in the Supreme Court of Kentucky. The constitutional spin is merely an afterthought. It cannot be properly asserted here. Rule 14.1(h); *Crenshaw, supra.* Considering ANB's own waivers and admissions, there are no special or important reasons to grant ANB's Petition. Sup. Ct. R. 10.

2. This Case Is Not Appropriate For Review in This Court Because the Facts Involved in ANB's Intentional Fraud and the Facts Which Justified the Jury's Punitive Damage Award Are Too Case Specific.

This is an extremely fact specific fraud case. ANB's failure to accurately and fully set forth the facts is reason alone to deny the writ. *United States* v. *Johnson*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). All of the trial court proceedings before, during, and after the twenty-four day trial were videotaped. Thirty-one witnesses testified. The exhibits were voluminous. The record has not been transcribed.

A review by this Court would involve questions of evidence and application of familiar legal principles. The jury's factual findings are based on special verdict interrogatories and are supported by clear and convincing evidence. A review merely to confirm settled principles of law would be of little or no public importance. Stern, *Supreme Court Practice*, §4.17 at 223 (6th Ed. 1986).

3. At ANB's Request, the Trial Court Instructed the Jury in Accordance With Kentucky's New Punitive Damage Statute and Provided Pre-Verdict Safeguards Which Were More Than Sufficient to Satisfy Constitutional Due Process.

The Kentucky legislature enacted a new statutory scheme for punitive damages, KRS §§ 411.184 and 411.186, after the Hanson's claim arose. This case is the first to apply the new statute. The statute specifies and limits the type of misconduct for which punitive damages may be claimed. The statute also incorporates standards and guidelines that limit jury discretion as to the award and amount of punitive damages. The trial court instructed that before the jury could even consider punitive damages, it had to find that the Hansons had proven the six elements of fraud against ANB by "clear and convincing evidence" (App. 3a-4a).

With respect to the jury's discretion to award punitive damages, the trial court incorporated the following statutory standards and guidelines in its instructions: (1) the "clear and convincing evidence" standard; (2) the definitions of the misconduct ("oppression," "fraud," or "malice") required for punitive damages; (3) the specific intent that must be shown for each type of misconduct; (4) the purposes of punitive damages, namely, to punish the defendant and to deter it and others from similar misconduct in the future; and, (5) the discretion of the jury to award punitive damages in addition to compensatory damages.

The trial court instructed that if the jury determined to award punitive damages, it should consider the following additional factors in determining the amount: (1) the likelihood that serious harm would arise from the defendant's misconduct; (2) the degree of the defendant's awareness of that likelihood; (3) the profitability of the misconduct to the defendant; (4) the duration of the misconduct; (5) any concealment of the misconduct by the defendant; and, (6) any actions by the defendant to remedy the misconduct once it was known to the defendant.

Finally, the trial court submitted the case to the jury on special verdict interrogatories pursuant to Ky. CR 49.01. The Kentucky rule follows FRCP 49(a). Ky. CR 49.01 is designed to insure exactness of the issues the jury is permitted to decide and the jury's findings on those issues. The jury returned special verdicts for fraud and for punitive damages. Both verdicts were based on clear and convincing evidence.

The form and content of the trial court's instructions satisfied constitutional due process. The Kentucky punitive damage statute and the trial court's instructions afforded ANB more *pre-verdict* safeguards and due process protection than the defendant in *Pacific Mut. Life Ins. Co.* v. *Haslip,* 111 S.Ct. 1032 (1991) had under Alabama law. The trial court, the Court of Appeals, and the Supreme Court of Kentucky all agreed that: the jury was properly instructed (Pet., 5a-6a, 14a); the evidence supported the jury's verdict against ANB on liability for compensatory and punitive damages (Pet., 11a-12a); and the jury's verdict for punitive damages was not the result of passion or prejudice (Pet., 14a).

There are no special and important reasons to grant ANB's Petition. The Supreme Court of Kentucky considered and applied *Haslip* when it reviewed and unanimously affirmed the trial court's judgment.

4. The Trial Court's Post-Verdict Review and the Final Appellate Review by the Supreme Court of Kentucky Were More Than Sufficient to Satisfy Constitutional Due Process.

ANB's representation that "[t]his Court has consistent with *Haslip*, granted review and reversed in at least eleven cases" is grossly misleading (Pet., 10). None of the cases were reversed. This Court vacated and remanded the cases for review by the lower courts in light of *Haslip*. The Supreme Court of Kentucky has already conducted such a review: "In the present case, the jury was given an instruction that met the standards in *Haslip* and the post-trial review by the trial court of the punitive damages award conformed to the *Haslip* test." (844 S.W.2d at 416; Pet., 14a). ANB's reliance on Sup. Ct. R. 10.1(b) as a reason for review in this case is misplaced (Pet., 10). There are no special and important reasons for this Court to conduct a further review or to require the Supreme Court of Kentucky to repeat its review.

Kentucky's statutory scheme for the assessment of punitive damages, as applied by the trial court and as explained and applied by Kentucky's highest court, provides far more safeguards and far more effective safeguards for protection of due process than did the Alabama common law method which the majority in *Haslip* found was constitutionally sufficient. In this case, ANB was afforded pre-verdict safeguards and the "clear and convincing evidence" standard that was suggested in the *Haslip* dissent.

The trial judge, who is now a judge on the Kentucky Court of Appeals, conducted a lengthy hearing on ANB's post-trial motions for judgment notwithstanding the verdict, new trial and remittitur on February 27, 1989. Before the hearing he had read all the briefs and all the authorities submitted, as well as others from his own research. The judge displayed the volumes of authorities he

had considered and stated on the record at the hearing that the handwritten notes and highlights on the authorities were his. He was fully aware of the evidence presented during the lengthy trial and ANB's counsel knew it. The trial court invoked the standards and discretion afforded to the trial court by Ky. CR 50.02, 50.03, 59.01, and 61.02.

ANB's representations that the trial court exercised no discretion and thought it had no discretion to protect ANB are false (Pet., 15). ANB has unfairly quoted the trial court out of context (Pet., 14-15). An examination of the trial court's entire statement reveals that it was supplying a rationale for its rejection of ANB's argument for a cap or multiple to limit punitive damages. Immediately after the comments quoted in the Petition, the trial judge stated:

> For some time defendants have advocated a stiffening of the standards for awarding punitive damages and the legislature responded to that and I did instruct under that statute although I still have some reservations as to whether or not it applied to this case. In other words I'm not sure the defendant was entitled to the more stringent rule that I instructed under. Likewise, I'm not sure the defendant was entitled to the rule under the fraud—fraudulent inducement part of the instructions that proof had to be by clear and convincing evidence but it seemed to me at the time that since the statute required that for punitive damages the case law required it for fraud that I ought to be consistent I ought to put that standard in for both and I did.

At the conclusion of the post-trial hearing the trial court further exercised its discretion by upholding the jury's verdict and denying ANB's motions:

> I've determined that I am going to overrule the motion for judgment notwithstanding the verdict. I'm also going to overrule the motion for remittitur. I will

> prepare an appropriate order, I will prepare a judgment in accordance with the discussions we had earlier today.

(Post-Trial Hearing, February 27, 1989). On March 9, 1989, the trial court entered its order denying ANB's motions for judgment notwithstanding the verdict, for remittitur, and for new trial.

The trial court's rationale for denying ANB's post-trial motions is consistent with Kentucky law. *Horton* v. *Union Light, Heat & Power Co.*, 690 S.W.2d 382, 385 (Ky. 1985) ("The role of the jury in interpreting the evidence and finding the ultimate facts is an American tradition so fundamental as to merit constitutional recognition. U.S. Const. Amend. VII; Ky. Const. Sect. 7"). The trial court's rejection of a cap or multiple on punitive damages was a harbinger of *Haslip*, which had not yet been decided. *Haslip*, 111 S.Ct. at 1043 ("We need not, and indeed we can not, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable. . . .") (emphasis added).

Kentucky's legislature has asserted its interest and has determined that punitive damage standards and safeguards are to be applied before the jury's verdict. KRS §411.186(2) ("If *the trier of fact* determines that punitive damages should be awarded, *the trier of fact* shall then assess the sum of punitive damages. In determining the amount of punitive damages to be assessed, *the trier of fact* should consider the following factors. . . .") (emphasis added). The appellate review process in Kentucky is not a trial de novo; in this case, the Supreme Court of Kentucky determined that statutory and common law standards were properly applied by the trial court. Kentucky's highest court did not find new facts, create a new standard or apply its own yardstick.

ANB misstates Kentucky law (Pet., 15-16). The Supreme Court of Kentucky conducted a thorough review of the record, in accordance with the principles set forth in *Davis* v. *Graviss*, 672 S.W.2d 928, 933 (Ky. 1984) (". . . these rules charge us with the *responsibility to review the record* and decide whether, when viewed from a standpoint 'most favorable' to the prevailing party, there is evidence to support the verdict and judgment. *Rogers* v. *Kasden*, 612 S.W.2d 133 (Ky. 1981).") (emphasis added). *Wal-Mart Discount City* v. *Meyers*, 738 S.W.2d 841, 845 (Ky. Ct. App. 1987) ("Viewing the evidence in the light most favorable to [plaintiff] as we are required to do, we conclude that the evidence adduced amply supports the jury's award. That being so, we are not free to set that award aside on the ground of excessiveness."). The Kentucky Court of Appeals recognized: "The damage award in *Davis* v. *Graviss*, *supra*, was for compensatory rather than punitive damages; however, in *Fowler* v. *Mantooth*, 683 S.W.2d 250 (Ky. 1984), the court applied the holding in *Davis* to review a jury's award of punitive damages." (Pet., 30a).

ANB's criticism of Kentucky's "first blush" doctrine is hypocritical (Pet., 16-17). ANB invoked the "first blush" doctrine at three levels of the Kentucky court system. In Kentucky, the "first blush" doctrine is a valuable tool to assist the trial court in post-trial review. It is not an arbitrary concept. In *Commonwealth, Dept. of Highways* v. *Friend*, 500 S.W.2d 405, 406 (Ky. 1973), Kentucky's highest court defined "first blush" as follows:

> "First blush" is simply a summary determination that a verdict is unsupported by evidence of probative value. It stems from a sense of shock that such a verdict could have resulted from the evidence heard, a conviction beyond doubt by the court that the jury, lacking substantial evidence of probative value, was motivated by passion, prejudice or other improper factors and the resulting verdict is shocking and outrageous. In

> making this determination the court can draw upon its own knowledge and experience and the common experience of humankind generally.

"First blush" is the defendant's ultimate safeguard; it is never invoked in favor of the plaintiff. It is ironic that ANB would attack it here after having relied on it in the Kentucky courts.

Fowler v. *Mantooth, supra* at 253, best describes the function of Kentucky's appellate courts in a punitive damage case:

> The appellate court will reverse only when it can be said that the trial court has "clearly erred", i.e., abused its discretion, in refusing to set aside the award as excessive.

The concurring opinion observed:

> The jury is the arbiter of the amount to be allowed. The verdict of a properly instructed jury as to punitive damages should not be set aside unless it can be held that no reasonable juror, on the basis of the evidence presented, could have reached such a verdict, and therefore the verdict reached must necessarily have resulted from bias or passion on the part of the jurors.

Id. at 254.

In *Louisville & N.R. Co.* v. *Roth,* 114 S.W. 264, 266 (Ky. 1908), the Kentucky appellate court made clear its determination to scrutinize the facts and circumstances of each case:

> It is not practicable to say, even approximately, what amount of punitive damages a jury may assess in a case where this character of damages may be allowed. It is even more difficult of approximation and ascertainment than the correct measure of compensatory damages in personal injury cases. In the very necessity of things the amount must depend upon the facts and circumstances of each particular case. And

> so the amount that may be awarded as punitive damages must necessarily be left to the sound discretion of a jury . . .

Nevertheless, the Supreme Court of Kentucky does not hesitate to reverse and order a judgment notwithstanding the verdict when it concludes "that the verdict of the jury was without sufficient evidentiary basis." *National Collegiate Athletic Association* v. *Hornung*, 754 S.W.2d 855, 860 (Ky. 1988).

A comment in *Judicial Assessment of Punitive Damages, The Seventh Amendment, and the Politics of Jury Review*, 91 *Columbia Law Review* 142, 181 (1991) is therefore apropros:

> A state-created procedure, however, "is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" [citations omitted] Under that standard, jury discretion in tort cases is more likely to be required by due process, given the jury's historical and constitutional role in American law, than prohibited by it.

If an appellate court could unilaterally take away the verdict of a properly instructed jury, which was rendered without passion or prejudice and which was strengthened by the trial court's denial of post-trial motions, then the jury would be stripped of the fact finding role inherent in the traditional jury trial and its function would be nothing more than advisory.

The Kentucky legislature and the Supreme Court of Kentucky have acted in harmony with the Seventh Amendment of the Constitution of the United States which states that ". . . no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law." "The general rule bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes

state courts as it finds them'." *Howlett* v. *Rose,* 496 U.S. 356, 372 (1990). There are no special and important reasons for this Court to grant ANB's Petition.

5. The Jury's Verdict for Punitive Damages Was Rational and Reasonably Related to the Need to Punish ANB for Its Fraud and to Deter ANB and Others From Similar Misconduct in the Future.

The jury's punitive damage verdict of $5.775 million took less from ANB than ANB took from the Hansons and the Bowling Green, Kentucky community. ANB's own president testified that he terminated $11 million in accounts and recovered $8.26 million of the losses from tax credits and sales of the collateral that secured the accounts. In closing argument, counsel for the Hansons requested $10 million for punitive damages.

The record provides reasons to believe the jury's verdict of $5.775 million for punitive damages was so conservative that the public's interest in the "punishment" and "deterrence" of fraud was not fully served. *Fowler* v. *Mantooth,* at 253:

> To relate excessiveness of the award only in terms of its reasonable relation to the injury sustained, is to tell only half the story. . . . But the fatal flaw is that this analysis leaves out of consideration the character of the act. . . . An award of punitive damages need not bear reasonable relation to actual damages . . . if the claimant's evidence regarding the character of the act, meaning the extent of conscious wrongdoings, is sufficient to sustain the award.

At a post-trial hearing, ANB's counsel admitted ". . . quite frankly I'm told by the accountants that the reason Mr. Greenwell's Judgment is not disclosed [in financial statements] is *based upon the size, it's not material*" (emphasis added).

ANB did not request the trial court to include "net worth" as a factor in the instruction as Ky. CR 49.01 required; ANB did not assert the issue in its prehearing statement of appeal as Ky. CR 76.14(6) required; ANB did not assert the issue in its motion for discretionary review in the Supreme Court of Kentucky as Ky. CR 76.20(3)(d) required; and ANB cannot rely on the issue here. Sup. Ct. R. 14.1(h). After the Supreme Court of Kentucky rendered its opinion on December 17, 1992, ANB paid the judgment on December 24, 1992, less interest and penalties ANB disputes.

It is difficult to imagine anything more repugnant in the business world than a group of bankers, calling themselves a "SWAT Team," taking over a community bank and implementing a clandestine scheme to deliberately defraud the established customers of additional collateral before terminating their accounts. As Mr. Hanson stated to David Chesnut the morning of the closing for the restructure on July 26, 1985: "If you can't trust your banker, who can you trust?"

In Kentucky, fraud is recognized as the most insidious of all torts. *Kreate* v. *Miller,* 11 S.W.2d 99, 102 (Ky. 1928). It involves the wrongdoer's state of mind. It is preconceived and deliberate. It exploits and abuses confidences. It is concealable. It can be ongoing. It is difficult to discover and, if discovered, most difficult to prove. *Prosser on Torts,* §107, at 741 (4th Ed. 1971) ("The intent which underlies an intentional misrepresentation is a more complex matter than the relatively simple intention in the case of assault and battery.").

There is no case where the proof and culpability for the tort converges more closely with the proof and culpability for punitive damages than a case involving a scheme of fraud and deceit. *Head* v. *Oglesby,* 194 S.W. 793, 797 (Ky. 1917) ("[T]he transaction throughout is reeking with deceit, fraud and misplaced confidence . . ."); *Walker* v. *Sheldon,* 179 N.E.2d 497, 499 (N.Y. App. 1961) ("Exemplary damages are more likely to serve their desired pur-

pose of deterring similar conduct in a fraud case . . . than in any other area of tort.").

In its common law and in its statutes, Kentucky has expressed its interest in the use of punitive damages to punish and deter fraud. Compensatory damages are not a deterrent. *Tyson* v. *Ewing*, 26 Ky. 185, 3 J.J. Marsh 185 (1830). By legislative definition "punitive damages . . . means damages, other than compensatory and nominal damages, awarded against a person to punish and discourage him *and others* from similar conduct in the future" KRS §411.184(f) (emphasis added). Kentucky is among the jurisdictions that recognize general deterrence as a purpose for punitive damages. On the facts in this case it is not enough to deter ANB alone. The record is clear that FKNC, ANB's new parent, ordered and funded ANB's fraudulent, malicious and oppressive misconduct. Over-deterrence is not a factor in this fraud case. In light of ANB's fraud, the need for deterrence of "others" cannot be ignored.

Kentucky's highest court has determined that the state's interest in the punishment and deterrence of fraud is consistent with the due process considerations set forth in *Haslip*. There are no special or important reasons for this Court to grant ANB's Petition.

CONCLUSION

After a 24-day trial, a Kentucky jury, instructed in accordance with Kentucky's new punitive damage statute, found that there was clear and convincing evidence of ANB's fraud and imposed punitive damages that were approximately five times the amount of compensatory damages. The destruction of the Hansons' business by ANB was a result of ANB's larger scheme to minimize its losses in the Bowling Green, Kentucky community. The punitive damage verdict was less than the amount ANB's president boasted he extracted from the community, on orders of ANB's parent.

After an exhaustive review of the facts and the law, the trial court entered judgment in accordance with the verdict. The Supreme Court of Kentucky determined that the punitive damage judgment was proper under Kentucky law. Kentucky's highest court considered *Haslip* in its appellate review and specifically found that the jury instructions applying Kentucky's punitive damage statute and the post-trial review satisfied constitutional due process. ANB was afforded more due process, pre-verdict and on appellate review, than the defendant in *Haslip* was afforded under Alabama law.

Kentucky's legislature and Kentucky's highest court have expressed Kentucky's displeasure with the secret and insidious tort of fraud; both have expressed Kentucky's interest in punishing and deterring fraud by punitive damages. Yet, ANB would have this Court ignore the two-fold assertion of Kentucky's interest. ANB would have this Court restructure Kentucky's appellate practice. ANB would have this Court erode the principles of federalism.

Respondents pray that ANB's Petition be promptly denied.

Respectfully submitted,

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APPENDIX

411.184 Definitions; punitive damages; proof of punitive damages

(1) As used in this section and KRS 411.186, unless the context requires otherwise:

(a) "Oppression" means conduct which is specifically intended by the defendant to subject the plaintiff to cruel and unjust hardship.

(b) "Fraud" means an intentional misrepresentation, deceit, or concealment of material fact known to the defendant and made with the intention of causing injury to the plaintiff.

(c) "Malice" means either conduct which is specifically intended by the defendant to cause tangible or intangible injury to the plaintiff or conduct that is carried out by the defendant both with a flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in human death or bodily harm.

(d) "Plaintiff" means any party claiming punitive damages.

(e) "Defendant" means any party against whom punitive damages are sought.

(f) "Punitive damages" includes exemplary damages and means damages, other than compensatory and nominal damages, awarded against a person to punish and to discourage him and others from similar conduct in the future.

(2) A plaintiff shall recover punitive damages only upon proving, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice.

(3) In no case shall punitive damages be assessed against a principal or employer for the act of an agent or employee unless such principal or employer authorized or ratified or should have anticipated the conduct in question.

(4) In no case shall punitive damages be awarded for breach of contract.

(5) This statute is applicable to all cases in which punitive damages are sought and supersedes any and all existing statutory or judicial law insofar as such law is inconsistent with the provisions of this statute.

HISTORY: 1988 c 224, §2, eff. 7-15-88

411.186 Assessment of punitive damages

(1) In any civil action where claims for punitive damages are included, the jury or judge if jury trial has been waived, shall determine concurrently with all other issues presented, whether punitive damages may be assessed.

(2) If the trier of fact determines that punitive damages should be awarded, the trier of fact shall then assess the sum of punitive damages. In determining the amount of punitive damages to be assessed, the trier of fact should consider the following factors:

(a) The likelihood at the relevant time that serious harm would arise from the defendant's misconduct;

(b) The degree of the defendant's awareness of that likelihood;

(c) The profitability of the misconduct to the defendant;

(d) The duration of the misconduct and any concealment of it by the defendant; and

(e) Any actions by the defendant to remedy the misconduct once it became known to the defendant.

(3) KRS 411.184 and this section are applicable to all cases in which punitive damages are sought.

HISTORY 1988 c 224, § 3, eff. 7-15-88

Civil Action No. 87-CI-318

WARREN CIRCUIT COURT
DIVISION I

HANSON CONSTRUCTION COMPANY, INC., ET AL., - *Plaintiffs,*

v.

AMERICAN NATIONAL BANK & TRUST COMPANY, ETC., - - - - - - - - *Defendant.*

INSTRUCTIONS TO JURY

In this case, as you know, there are several claims made by the parties against each other, and there are a number of separate issues arising out of these claims. These issues will be submitted to you for your consideration in the form of specific questions, known as Special Interrogatories, which will constitute the form of your verdict.

You should consider all of the following instructions before completing the verdict form to be found at the end of these instructions.

INSTRUCTION NO. I

In this case, one of plaintiffs' claims against the defendant is based upon certain allegedly false and fraudulent misrepresentations made by the defendant, American National Bank, to the plaintiffs, H. C. Hanson, Virginia Hanson, H. C. Hanson Construction Company, Inc. and Construction Engineers, Inc.

The essential elements that the plaintiffs must prove by clear and convincing evidence to establish a claim for fraudulent misrepresentation are as follows:

First, that the American National Bank made one or more of the following representations to the plaintiffs:

(a) That the Bank would provide a new line of credit for $125,000.00 to finance the operation of H. C. Hanson Construction Company, Inc.,

(b) That the Bank would finance the future construction contracts of H. C. Hanson Construction Company, Inc., and/or

(c) That subject to the renegotiation of principal and interest payments at the end of each three-year term, the plaintiffs would have up to fifteen (15) years to repay the American National Bank so long as the plaintiffs paid as agreed under the terms of the restructure agreement and complied with the other terms of that agreement;

Second, that at the time the representations were made, the Bank had no intention of performing them;

Third, that the Bank's representations were made in order to induce the plaintiffs to enter into the restructure agreement;

Fourth, that the plaintiffs justifiably relied and acted upon the representations;

Fifth, that the plaintiffs acted with ordinary prudence in relying upon the representations; and

Sixth, that one or more of the plaintiffs suffered injury or damage as a result of the misrepresentations.

In determining whether the plaintiffs acted with ordinary prudence in relying upon the representations, you will keep in mind that it was the duty of the plaintiffs to exercise reasonable care for the protection of their own interests by making reasonable inquiry or investigation under the circumstances presented.

INSTRUCTION NO. II

In the performance and the enforcement of the loan agreements concerning which you have heard evidence, both the plaintiffs, H. C. Hanson, Virginia Hanson, H. C.

Hanson Construction Company, Inc. and Construction Engineers, Inc., and the defendant, American National Bank, had a duty to act in good faith.

Good faith means honesty in fact in the conduct or transactions concerning which you have heard evidence.

INSTRUCTION NO. III

Corporations such as H. C. Hanson Construction Company, Inc., Constructions Engineers, Inc. and American National Bank can act only through their employees. Therefore, an act of any corporate employee in the course and scope of his employment is the act of the corporation.

INSTRUCTION NO. IV

If you find and return a verdict for the plaintiffs, you will award H. C. Hanson Construction Company, Inc. a sum of money which will fairly and reasonably compensate it for the fair market value of H. C. Hanson Construction Company, Inc. on March 23, 1987, not to exceed $2,130,964.00, the amount claimed.

INSTRUCTION NO. V

If you find for the plaintiffs, H. C. Hanson, Virginia Hanson, H. C. Hanson Construction Company, Inc. and Construction Engineers, Inc. under Instruction No. I, and if you are satisfied by clear and convincing evidence that the defendant, American National Bank, acted toward the plaintiffs with oppression, fraud or malice, you may award the plaintiffs punitive damages against the defendant in addition to any damages awarded under Instruction No. IV.

• • •

The term *oppression*, as used above, means conduct which was specifically intended by the defendant Bank to subject the plaintiffs to cruel and unjust hardship.

The term *fraud*, as used above, means an intentional misrepresentation, deceit or concealment of material fact known to the defendant Bank and made with the intention of causing injury to the plaintiffs.

The term *malice,* as used above, means conduct which was specifically intended by the defendant Bank to cause tangible or intangible injury to the plaintiffs.

* * *

Punitive damages may be awarded against a defendant to punish and to discourage it and others from similar conduct in the future.

If you determine that punitive damages should be awarded, you should consider the following factors in fixing the amount of such damages:

(a) The likelihood at the time the plaintiffs were damage by the defendant Bank's conduct that serious harm would arise from such conduct;

(b) The degree of the defendant Bank's awareness of that likelihood;

(c) The profitability of the misconduct to the defendant Bank;

(d) The duration of the misconduct and any concealment of it by the defendant Bank; and

(e) Any actions by the defendant Bank to remedy the misconduct once it became known to the defendant Bank.

INSTRUCTION NO. VI

Nine or more of you may agree to answers to the questions contained in the Verdict Form. If all twelve of you agree, the answers need be signed only by your foreman. Otherwise, they must be signed by your foreman and by the nine or more who agree to them. If your verdict is not unanimous and is signed by nine or more of your number, and if your foreman is among those who agree to the verdict, he or she shall sign the verdict twice, once as foreman and once as one of the jurors who agree to the verdict.

Any juror may serve as foreman upon being selected by his or her fellow jurors.

VERDICT FORM
SPECIAL INTERROGATORIES

1. Refer to Instruction No. I: Have the plaintiffs established their claim against the defendant for fraudulent misrepresentation by clear and convincing evidence?

YES X NO ___

* * *

2. Refer to Instruction No. II: Are you satisfied from the evidence that the defendant violated its duty to deal in good faith with the plaintiffs in the performance and enforcement of the loan agreements?

YES X NO ___

* * *

3. Refer to Instruction No. III: Are you satisfied from the evidence that the plaintiffs violated their duty to deal in good faith with the defendant in the performance of the loan agreements?

YES ___ NO X

* * *

If you answered "No" to Question 1 and to Question 2, do not answer Question 4. If you answered "Yes" to either Question 1 or to Question 2 and "No" to Question 3, you should answer Question 4.

4. Refer to Instruction No. IV: What sum do you find from the evidence will fairly and reasonably compensate the plaintiff, H. C. Hanson Construction Company, Inc. for the fair market value of the corporation on March 23, 1987?

$1,065,000.00

* * *

If you answered "No" to Question 1, do not answer Question 5. If you answered "Yes" to Question 1 and "No" to Question 3, you should answer Question 5.

5. Refer to Instruction No. V: What sum do you find from clear and convincing evidence should be awarded the plaintiffs as punitive damages?

$5,775,000.00

/s/ Roger D. Crabtree
Foreman

/s/ Roger D. Crabtree
/s/ Jack Butler
/s/ Sandy Whitney
/s/ Barbara Watt
/s/ Orville Phelps
/s/ Norma F. Harvey
/s/ J. Todd Tolbert
/s/ Lawrence White
/s/ Larry LaRue
/s/ Troy Tabor

Credit File

Company name	Person contacted	Company no.
N. C. Hanson Construction Co., Inc.		

7 28

vling Green, Kentucky

☐ Customer ☐ Prospect	Location	☐ In Bank ☐ At Company	Employee no.	Primary SIC no.	Secondary SIC no.	Call date	Follow-up
						/ /	/ /

Subjects Discussed

Credit			Deposit			Cash Management					
11 Revolver	☐N	☐M	21 DDA	☐N	☐M	31 Collection	☐N	☐M	40 International	☐N	☐M
12 Term	☐N	☐M	22 Savings	☐N	☐M	32 Payment	☐N	☐M	50 Trust	☐N	☐M
13 Seasonal	☐N	☐M	23 Time	☐N	☐M	33 Management	☐N	☐M	60 NPC	☐N	☐M
14 Money Mkt	☐N	☐M	24 IRA	☐N	☐M	30 Other	☐N	☐M	70 Lease	☐N	☐M
10 Other	☐N	☐M	25 CTIF	☐N	☐M						
			20 Other	☐N	☐M						

Page no.
1

July 8, 1985

Officer:

Analyst:
T. Gurbach

Background: Subject is a general contractor involved in the construction of bridges, culverts and drainage systems for highways and is owned wholly by H. C. Hanson since 1967. The last five years has seen the company's gross margin drop drastically as highway construction in the state has dropped off, leaving a large supply of contractors and a small demand for work. Thus, Mr. Hanson has been forced to make low bids in order to keep working which has resulted in a net operating loss for the last 4 1/2 years which continuously grows larger. Since 1980 when the situation started to decline up to today ANB indebtedness to Mr. Hanson and related companies has gone from $115M to $707M while debt to other creditors has all but disappeared.

Related Companies: Dixie Engineering (Incorporated - Virginia Hanson, wife - 55%, Stephen Hanson, son - 25%, David Hanson, son - 10% and H. C. Hanson - 10%) is a contractor which Stephen Hanson runs, performing mainly small concrete work. N/was of 5-31-85 was ($26M) and net income for the first six months of 1985 was ($9M). Construction Engineers (wholly owned by H. C. Hanson) is the company Mr. Hanson began with in the contracting business. After his partner died in the late 1960's, Mr. Hanson left this company and started H. C. Hanson Construction Co., Inc., thus this is an inactive company. On 6-4-85 H. C. Hanson Construction Co., Inc., sold Construction Engineers two pieces of heavy machinery for $78M and also transferred $78M of debt to Construction Engineers. This was done so that H. C. Hanson Construction could make a profit on the sale and make its 1985 income statement look better for the bonding company. This company also owns a one-half interest in real estate in Warren Co. (Fred Blaine & Co., owns the other half) which will be mortgaged to ANB under the rewrite.

Purpose of the rewrite is to combine all outstanding of H.C. Hanson Construction Co., Inc., Construction Engineers and Mr. Hanson personally. Following is a list of the above mentioned debt to ANB:

PLAINTIFF'S EXHIBIT
16.

W.H. & C. Hanson Construction Co. Inc. LOCATION: G.

	ASSETS (000's)	Type Data	Unaud 10/31/80	Unaud 10/31/81	Unaud 10/31/82	Unaud 10/31/83	Unaud 1/31/84
1.	Cash		18	46	164	12	
2.	Notes Receivable						
3.	Accounts Receivable, Gross						
4.	Less Loss Allowance						
5.	Accounts Receivable, Net		144	196	176	154	
6.	A/R - Retainage		1	15	17	-	
7.	Inventory		28	31	27	60	
8.							
9.							
10.	Temporary Investment		102	100	100	100	
11.							
12.	CURRENT ASSETS		291	440	484	357	
13.	Land - Other		10	10	10	10	
14.	Land - Co.'s premises		21	14	1	1	
15.	Buildings, Net						
16.	Equipment & Fixtures, Net		316	402	304	223	
17.	Due from Officers/Employees		4	13	12	-	
18.	Prepaid & Deferred Items		8	16	4	9	
19.							
20.	L/R - Affiliate		32				
21.	A/R - Affiliate		54	38	25	5	
22.	Other Assets		11	19	18	19	
23.	TOTAL ASSETS		747	942	860	716	
	LIABILITIES						
24.	Notes Payable, ~~Banks~~ CP - ANB		110	50	31	56	
25.	Notes Payable, Others - LOC - ANB					10	
26.	Current Portion Term Debt - Other		58	44	23	14	
27.	Trade Accounts Payable		71	49	50	96	
28.	Accrued Expenses		16	22	19	15	
29.	Income Taxes		2	-	1	-	
30.	Overdraft						
31.	Due to Subcontractors		56	124	156	25	
32.							
33.	CURRENT LIABILITIES		313	289	280	216	
34.							
35.	Term Debt, ~~Bank~~ ANB		5	253	147	153	
36.	Term Debt, Other		70	36	15	-	
37.							
38.	Subordinated Debt (To FNBL)						
39.	N/P - A.C. Hanson		100	100	100	110	
40.	TOTAL LIABILITIES		488	678	542	509	
41.	MINORITY INTERESTS						
42.	Preferred Stock						
43.	Common Stock		25	25	25	25	
44.	Capital Surplus						
45.	Retained Earnings		234	239	293	182	
46.	(Intangibles)						
47.							
48.	TANGIBLE NET WORTH		259	264	318	207	
49.	LIAB. & NET WORTH & MINORITY INT.		747	942	860	716	

10-450-042 REV 9/84

*24/1

Subject: H.L. AARON CONSTRUCTION CO. INC. — Cash Flow Analysis Worksheet

Statement Date	10/31/81	10/31/82	10/31/83	10/31/84
Net Income from Operations	5	54	(111)	(167)
Items Not Affecting Working Capital:				
Depreciation	79	77	74	84
Amortization				
Deferred Taxes				
Gain/Loss on Disposals	(78)	(129)	(15)	1
Other				
Working Capital from Operations:	6	2	(52)	(82)
(Increase) Decrease in:				
Accounts Receivable	(54)	22	17	(16)
Inventory		4	(54)	16
Marketable Securities				
Other Current Assets			17	
Increase (Decrease):				
Accounts Payable	(22)	1	46	(42)
Taxes Payable	(2)			
Accrued Expenses	6	(3)	5	12
Other Current Liabilities				
Due to Subcontractors	69	32	(131)	(9)
CASH FLOW (DEFICIT) FROM OPERATIONS:	63	59	(152)	(131)
Curr. Mat. of L-T Debt & Cap. Leases at FYE:				
Applications:				
Capital Expenditures	217	4	94	82
Retire Long-Term Debt	74	167		8
Dividends				
Increase Other Non-Current Assets	3	1	16	2
Decrease Short-Term Debt				
Decrease Other Non-Current Liabilities				
N/R- Stkhldr	4			
Total Applications:	303	172	110	92
External Sources:				
Increase Long-Term Debt	214	-	45	177
Issuance of Capital Stock				
Sale of Fixed Assets	77	163	20	14
Increase Short-Term Debt & Overdraft			10	18
Increase Other Non-Current Liabilities				
Decrease Other Non-Current Assets	27	6	35	4
Total External Sources	318	169	110	213
Change in Cash	77	66	(152)	(12)

10-101-637 9/82

55.	Quick Ratio	.72	1.52	1.73	1.63	1.5
56.	Debt/Worth Ratio & (Sub.Debt Adj.)	1.58	2.57	1.70	2.96	1.6
55.	Fixed Assets/Worth Ratio					
56.	Contingent Liabilities Commitments					

	N.C. Henson Construction Co Inc. OPERATING FIGURES (000's)	12 Months Ended 10/31/80	12 Months Ended 10/31/81	12 Months Ended 10/31/82	12 Months Ended 10/31/83	12 Mo Ended 10/31
	[redacted] Revenues	2060	1702	1671	1155	17
58.	Cost of [redacted] Construction	1709	1470	1490	1049	15
	Gross Profit (Loss)	351	232	181	105	1
	Operating Expenses	265	198	199	186	2
61.	Gross Operating Profit	86	34	(18)	(81)	(1
62.	Interest Expenses	45	61	78	59	
	NET OPERATING PROFIT	41	(27)	(96)	(140)	(1
64.	Other Income (Expense)	20	32	151	29	
65.	Extraordinary Gain (Loss)	-	-			
	Income Before Taxes	61	5	55	(111)	(1
8.	Income Taxes (Refund)	2	-	1	-	
68.	NET INCOME (Loss)	59	5	54	(111)	(1
	Cash Dividends/Withdrawals					
70.	Adjustment Retained Earnings					
7	Net Change Retained Earnings	59	5	54	(111)	(1
7	Net Stock Transactions					
73.	Net Change Capital Surplus					
74.	Net Change Net Worth	59	5	54	(111)	(1
7						
76.	Depreciation and Amortization	49	79	77	74	7
77	Percent Gross Margin 59 ÷ 57	17 %	14 %	11 %	9 %	
	EBIT/Interest Expense (61 + 64) ÷ 62					
79	Percent Net Margin 68 ÷ 57	%	%	%	%	
80.	Accts. Receivable Turn 57 ÷ 6 (Days)	26	40	38	50	3
8	Inventory Turn 58 ÷ 8 (Days)	16	8	7	28	1
8	Cash Flow From Operations					
83.	Analyst	T. Gurley				T. Gur

	19			19			19			19			19			19		
	Avg. Coll. Bal.	Avg. Free Bal.	Avg. Loan Bal.	Avg. Coll. Bal.	Avg. Free Bal.	Avg. Loan Bal.	Avg. Coll. Bal.	Avg. Free Bal.	Avg. Loan Bal.	Avg. Coll. Bal.	Avg. Free Bal.	Avg. Loan Bal.	Avg. Coll. Bal.	Avg. Free Bal.	Avg. Loan Bal.	Avg. Coll. Bal.	Avg. Free Bal.	Avg. Loan Bal.

H. C. Hanson Construction Co., Inc.
Bowling Green, Kentucky

H. C. Hanson Construction Co., Inc.

Type	Original Amount	Date	Current Principal Balance	Payment	Collateral	Value
ILD	$ 52,573	01-16-83	$ 21,696	$1,095/Mo.	'83 Ford Truck '84 Ford Truck	$14M
ILD	18,818	10-19-84	12,837	386/Mo.	'85 Mercury	
4 Yr. Term	125,000	02-06-85	119,818	3,323/Mo.	60 ton Crawler #85A	
5 Yr. Term	100,000	10-31-83	100,000	Int Qtrly $20M Principal payment 10-31 of each year	A/R	
5 Yr. Term	125,000	10-31-84	125,000	Int Qtrly $25M Principal payment 10-28 of each year	Equipment	
Line of Credit	125,000*	02-17-84	63,000**	Int Qtrly	A/R, Inv., Equipment	
Letter of Credit	100,000*	06-02-85	0		2nd Mtg. Residence	
			442,351			
H. C. Hanson						
2 Yr. Term with balloon	$175,000	12-30-83	$170,632	$ 2,214/Mo.	1st Mtg. Office $225M the Construction Company operates out of	
Subtotal						
Construction Engineers						
No Maturity Date	$ 78,000	06-04-85	$ 78,000	$ 2,000/Mo.	1980 Komats Dozer	$22M
			$667,983	$12,040/Mo.		

*Amount of commitment.
**As of 7/2/85 the subject has $23M in A/R from jobs in progress and thus the

H. C. Hanson Construction Co., Inc.
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new line will start out with $23M of the old line on it and it will be paid off when these receivables are collected.

The new term loan would be in the amount of $667,983 with monthly payments of $7,594.84 (15 yrs. at 11% with a three year balloon).

This loan together with the letter of credit will be secured by the following:

Description			Value
1st Mtg. Office on Kelly Road			$225,000
2nd Mtg. Residence			187,000
A/R (Receivables on jobs in progress will be used to secure line of credit)			
Retainages		29,000	
Other		5,000	
Doubtful	14,000		
			$ 34,000
Inventory - 2 bridges (one sold for $10M)		27,000	
used materials (he values at $33M)		5,000	
			$ 32,000
Equipment*			
1980 Komatsu Dozer		22,000	
1979 Case Unileader		8,000	
2 1984 Ford Trucks		14,000	
Link Belt - 60 Ton Crane (1974)		85,000	
1969 Bucyrus-erie 20 Ton		15,000	
1979 Ford Backhoe		12,000	
Rustin Bucyrus-erie 150 Tracthoe		20,000	
951C Traxcator (Catipillar) 1972		12,000	
Gromako Slab Machine C450 1981		12,000	
Shield Bantam Motor Crane - 15 Ton 1967		12,000	
Other Equipment (he values at $200M)		20,000	
*Values Come From Last Bid Book			$242,000
Equipment of Construction Engineers			$ 10,000
1st Mtg. One-half Interest - 312 Acres in Barren Co.		13,000	
1st Mtg. One-half Interest - 12 Acres land next to GM in Warren Co.		14,000	
1st Mtg. Lot in Indian Hills		2,000	
1st Mtg. Land in Florida		10,000	
Assignment of CNB Stock		3,000	

H. C. Hanson Construction Co., Inc.
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Assignment of H.C. Hanson Construction Co., Inc., Stock & Construction Engineers Stock	0
	$772,000

There will also be a letter of credit for $100M which could be used by his bonding company, Manus & Smith, of Louisville. This would be drawn against only if Mr. Hanson's company was unable, for whatever reason, to finish a contract. This is for one year and will be looked at again after it expires and decision will be made at that time on whether to renew it or not. It will be secured by the above collateral package.

To keep the subject in business ANB will give them a line of credit. This will be used to pay wages for direct labor, or subcontractors, purchase surety bonds and for fuel expense. It will not be used to purchase large beams, etc., as he receives them from suppliers who in turn must wait for the contractee to pay the subject, which will then pay them. These advances will not be permitted until the bank receives a copy of the state's inspector's report (the bank's collateral) showing what percentage of the total contract is completed and the amount he has coming in from the state. When Mr. Hanson receives this payment the entire amount (minus any payments to suppliers for beams, etc.,) will be brought to the Bank and applied to the line of credit. This will insure proper use of the line. Due to the amount advanced will be more than he needs (the difference representing his profit) the remaining will be available for general and administrative expenses, interest on the line and payments on the large amortizing note.

Conclusion: Over the past four and one-half years the subject has lost $387M due to its cutting its gross margin substantially in order to keep working in a very competitive environment. Over the same period the company's and related company's debt to ANB has risen from $115M to $707M as the bank paid for operating and interest expenses that gross profits could not meet and helped retire the debt of other creditors. If the bank foreclosed today it would loose, on an optimistic basis, $140M if the building and land which he operates out of brings its full appraised value at auction and the equipment brings the value the Last Bid book indicates. The loss on a conservative basis would be closer to $250M. Also the $100M letter of credit would be drawn by the Bonding Co., to finish uncompleted jobs, however, the bank would come out alright there as it is secured by a 2nd mortgage on Mr. Hanson's home valued at $190M (note that this is not currently cross pledged with any of the subject's other debt).

However if ANB waited three to five months to foreclose it could come out with no loss due to the taking of additional collateral set out earlier, and due to the subject not having any jobs during the winter, thus the Bonding Co., will not have to draw down on the letter of credit. Due to the restrictive nature of the rewrite no new advances will be made to fund operating expenses or payments of principal and interest on the new term debt when he runs out of contracts this

H. C. Hanson Construction Co., Inc.
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winter, (in previous winters the bank has allowed this, from 6/84 to 2/85 total debt increased $110M) thus this cash will have to come from the sale of his personal assets, in order to keep his company alive. It appears he could sell $18M worth of cattle, cash in a $7M I.R.A. and $5M worth of Kellwood bonds, sell his stock in the B.G. County Club ($2M) or sell some of his household belongings ($30M) over the winter. Other sources of relief would come from the sale of real estate mortgaged to ANB to secure the term note. The money brought in could be used to pay operating expenses instead of applied directly to the term note at the loan officers discretion.

Overall this rewrite should reduce the banks potential loss and force Mr. Hanson to sell off his personal assets which undoubtedly will bring more than if the bank auctioned them off. There is also a slim chance that the demand for building bridges will pick up significantly in the next year or so, Mr. Hanson could start realizing margins of 15%-17% again and pay the bank back through profitable cash flow. However, that is hard to predict and now I recommend the approval of the rewrite and suggest the notes go on non-accrual with all payments reducing principal.

Tom Gurbach Tom Gurbach

TG/40-127

AMERICAN NATIONAL BANK
SWAT MINUTES OF
H. C. HANSON CONSTRUCTION

7-9-85:	We are going to wrap everything together, take all collateral we can get and we should be fairly well secured. We are going to give him a line of credit for this year. We will also be secured by contracts from counties he is working in. We have a $100,000 life insurance policy. Take a good look at this in September to see what his cash flow will be. ($635,706.21)
8-15-85:	All three notes have been combined and additional collateral has been taken. ($691,023.00)
9-17-85:	Loan has been restructured and paying as agreed. Collateral fully covers the indebtedness. ($595,434)
10-15-85:	Loans have been restructured and paying as agreed. ($587,191.61)
11-12-85:	Paying as agreed. The loan is current. ($578,384.79)
12-17-85:	Hanson is dealing with bonding companies for 1986 Bond. Appears ANB will have to extend letter of credit for Hanson to receive a bond of $250,000. The Executive Loan Committee to discuss bonding requirements. ($682,711.35)
1-14-86:	Has been restructured and paying as agreed. ($605,711.35)
2-18-86:	This account has been restructured and paying as agreed. ($696,712.72)
3-24-86:	Continuing to pay. ($603,212.72)
4-21-86:	Paying as agreed. ($606,712.78)
5-20-86:	Has an additional $175,000 line of credit in order for him to sign a contract for a $975,000 job. ($643,212.72)

6-17-86: No change. ($692,212.72)

7-15-87: We have received a letter from Elmo Greer & Sons. They are going to make checks payable to H. C. Hanson, Jim Skaggs, Inc., and ANB. ($691,962.72)

9-17-86: We need to start receiving quarterly financial statements. ($679,890.62)

11-18-86: Received 6 months statement. Continues to pay as agreed. (Need to get assignment on new job.)

1-20-87: He has met with us and reported to have contracted two new jobs totaling $1.5 million. His financial statements will be completed next week and he will be in to negotiate a new escrow line. ($730,000)

2-17-87: On 2-5, the Loan Committee turned down the escrow line of credit. We agreed to fund him an additional three weeks of payroll in order to get contractors to help support company. ($710,476.23)

3-17-87: Demand was made March 11, for payment of escrow lines by April 1, 1987.

4-28-87: Suit filed against ANB by Hanson. In process of countersuit and foreclosure of collateral.

Civil Action No. 87-CI-318

WARREN CIRCUIT COURT
DIVISION I

HANSON CONSTRUCTION COMPANY, INC., Et Al. - *Plaintiffs*

v.

AMERICAN NATIONAL BANK & TRUST COMPANY - - - - - - - - *Defendant*
Counter-Claimant
Third Party Plaintiff

v.

LUCILLE KINSLOW, Et Al

REQUEST TO ADMIT—Filed November 21, 1988

Plaintiffs, Hanson Construction Company, Inc., H. C. Hanson, Virginia Hanson and Construction Engineers, Inc., request that the defendant, American National Bank and Trust Company (hereafter "ANB"), within thirty days after service of this request separately admit, pursuant to Ky CR 36 and for the purposes of this action only, the truth of the following statements:

1. The copy letter dated September 29, 1987, from Gail W. Pohn to Charles D. Greenwell which is attached as Exhibit A is genuine and is a complete and accurate representation of the actual writing which the document purports to represent.

2. Mr. Pohn's conversation with Judge Henry Meigs regarding ANB's consideration of suit against Charles D.

Greenwell and his firm, Middleton & Reutlinger, was intended to influence the representation of plaintiffs in this action by Charles D. Greenwell.

3. The copy of letter attached as Exhibit B is a true and accurate representation of the body of a letter which was sent to the creditors of H. C. Hanson and Hanson Construction Company.

4. The letter to creditors attached as Exhibit B was a proper attempt to verify the claims of creditors and mitigate the damages to plaintiffs resulting from ANB's termination of credit.

/s/ Charles D. Greenwell
Charles D. Greenwell
David J. Kellerman
Middleton & Reutlinger
2500 Brown & Williamson Tower
Louisville, KY 40202
(502) 584-1135
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was mailed by U.S. mail, First Class Postage Prepaid to Darell R. Pierce, Esq., Morgan & Pottinger, 513 E. 10th Street, Bowling Green, Kentucky 42101; Douglas Gene Sharp, Morgan & Pottinger, 601 West Main Street, Louisville, Kentucky 40202; and Robert M. Alexander, Esq., 112 East Public Square, Glasgow, Kentucky 42141, this 27 day of April, 1988.

/s/ Charles D. Greenwell

[LETTERHEAD OF FIRST KENTUCKY NATIONAL CORPORATION]

Charles D. Greenwell
September 29, 1987
Charles D. Greenwell, Esq.
Middleton & Reutlinger
2500 Brown & Williamson Tower
Louisville, Kentucky 40202-3410

Re: Hanson Construction Company v. American National Bank

Dear Mr. Greenwell:

Mr. Doug Sharp has been kind enough to forward to me your letter to him of September 25, 1987, on page 2 of which is noted a conversation that I had with your partner Judge Henry Meigs.

I want to take this opportunity to clear-up, for the record, what appears to be certain misunderstandings or misinterpretations of my conversation with Judge Meigs. It should be clearly understood that in meetings and conversations concerning this lawsuit, I have at all times acted in my capacity as General Counsel to First Kentucky National Corporation, ("FKNC") not First National Bank of Louisville. For your information FKNC is the sole shareholder of American National Bank ("ANB").

In my discussion with Judge Meigs I indicated that ANB was considering filing a lawsuit against you and the firm based on a letter sent by you to creditors of Hanson Construction Company which ANB considers libelous. I further indicated that if we decided to file the suit it would be filed within 30 days. It should be clearly understood that no decision has been made concerning the filing of such a lawsuit either against you or the law firm. The matter is under consideration.

Furthermore, I did not tell Judge Meigs that he should put your firm's malpractice carrier on notice; rather I sug-

gested that he might want to consider such action. I was in no way implying that you have engaged in malpractice in connection with the Hanson litigation. What I did suggest to Judge Meigs and will suggest to you is that the letter written by you to creditors of Hanson Construction Company is defamatory and may be the basis for an action by American National Bank.

It is out of my consideration and respect for Judge Meigs and another member of your law firm, and as a matter of professional courtesy that I felt the firm was entitled to know of this contemplated action.

Should you have any questions or desire to discuss this matter with me please let me know.

Very truly yours,
/s/ Gail W. Pohn
Gail W. Pohn

GWP/29-125

[LETTERHEAD OF MIDDLETON & REUTLINGER]

EXHIBIT B

RE: Hanson Construction Co. v. American National Bank
Warren Circuit Court, Div. I, C.A. No. 87-CI-318

Dear Creditor:

Hank Hanson of H. C. Hanson Construction Co., Inc., has asked me to write you concerning his action against the American National Bank and the efforts being made which we hope will result in the full payment of the indebtedness owed to you.

As with most construction contractors, H. C. Hanson Construction Co. was dependent on arrangements with its bank, American National Bank, for the financing of construction work in progress. For years American National Bank has been the dominant creditor of Mr. Hanson, his wife and Mr. Hanson's companies and held security interests in their respective assets to secure payment of obligations to the bank. Despite past financial reversals, Mr. and Mrs. Hanson and the Hanson companies always made payment on their obligations to American National Bank when due. In July, 1985, after a change in the bank's ownership American National Bank and the Hansons restructured all outstanding obligations to the bank and established lines of credit to capitalize the operations of H. C. Hanson Construction Co. in connection with new work acquired by the company. Mr. Hanson worked diligently to increase his company's work in progress from approximately $250,000 in 1985 to approximately $2.5 million in February, 1987. During this same period, H. C. Hanson Construction Co. went from a reported loss of $125,000 in October, 1985, to a reported profit in 1986. In addition, the Hansons substantially reduced their obligations to American National Bank. Remarkably, however, in February, 1987, American National Bank terminated Hansons'

established lines of credit, demanded payment of Hansons' obligations to the bank and enforced assignments against contract payments for construction work by H. C. Hanson Construction Co., all without any default on the part of Mr. and Mrs. Hanson and the company. As a result, the Hansons have been forced to default on payment of obligations to you and other creditors.

The Hansons' suit against American National Bank maintains, among other things, that the bank's actions violated he bank's duty of good faith and fair dealing in the bank/customer relationship with the Hansons. The Hansons seek recovery for damages including the loss and destruction of H. C. Hanson Construction Co. as a going concern, impairment of credit and reputation and for an amount sufficient to honor the indebtedness owed to you and other creditors.

As part of our proof of damages in this action, I need to have a verified statement of your outstanding account. I would also appreciate a signed statement from you concerning Hansons' credit and reputation with you prior to the present default, i.e., "Hank Hanson and his companies have always had a good credit reputation with me prior to ___."

The bank has responded to the Hansons' suit with a counterclaim for foreclosure on its security interests, including a Writ of Possession against the construction equipment of H. C. Hanson Construction Co. The bank was required to post a bond for $500,000 before taking possession of the equipment and the bond should be available to cover damages if the Hansons prevail in their suit against the bank.

The motives for the bank's actions are not entirely clear. However, discovery is in process and you, or your counsel, are welcome to review the records which we have obtained from the bank. If it is at all possible, Mr. and Mrs. Hanson are anxious to avoid bankruptcy and to honor all obligations which the Hansons or their companies owe. I hope that you will support the Hansons' effort by furnishing the

information that I have requested by way of forebearance on your claim during the course of the pending litigation. Moreover, if you have any knowledge of another case where American National Bank has taken similar action against an established customer, I hope that you will let me know.

If you or your counsel have any questions, please call. In consideration for your patience and upon request, we will attempt to give you a periodic status report on the course of the litigation and the prospects for payment of your claim.

Thank you for your attention.

Very truly yours,

/s/ Charles D. Greenwell
Charles D. Greenwell

CDG:bjh